United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, September 21, 2021 **Hearing Room 5B**

10:30 AM
8:00-00000 **Chapter**

#0.00 **Hearings on this calendar will be conducted using ZoomGov video and audio.**

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CONT... **Chapter**

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- Say your name every time you speak.
- Disconnect from the meeting by clicking "Leave" when you have completed your appearance(s).

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CONT... **Chapter**

Docket 0

Tentative Ruling:

- NONE LISTED -

United States Bankruptcy Court
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Tuesday, September 21, 2021 **Hearing Room 5B**

10:30 AM
8:21-11913 Thomas E. Acker **Chapter 7**

#1.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

KADE LAI
Vs
DEBTOR

Docket 11

Tentative Ruling:

Tentative for 9/21/21:
Grant. Appearance: optional

Party Information

Debtor(s):

Thomas E. Acker — Pro Se

Movant(s):

Kade Lai — Represented By
John E Bouzane

Trustee(s):

Thomas H Casey (TR) — Pro Se

10:30 AM
8:20-11881 Erwin Untalan Padillo and Vivian Fajatin Bautista **Chapter 13**

#2.00 Motion for relief from the automatic stay PERSONAL PROPERTY

TOYOTA LEASE TRUST
Vs.
DEBTORS

Docket 30

Tentative Ruling:

Tentative for 9/21/21:
Grant. Appearance: optional

Party Information

Debtor(s):

Erwin Untalan Padillo	Represented By Hasmik Jasmine Papian

Joint Debtor(s):

Vivian Fajatin Bautista	Represented By Hasmik Jasmine Papian

Movant(s):

Toyota Lease Trust, as serviced by	Represented By Austin P Nagel

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
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Tuesday, September 21, 2021 **Hearing Room 5B**

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8:21-11586 Farouq Omar and Marina Omar **Chapter 7**

#3.00 Motion for relief from the automatic stay PERSONAL PROPERTY

LBS FINANCIAL CREDIT UNION
Vs
DEBTORS

Docket 27

Tentative Ruling:

Tentative for 9/21/21:
Grant. Appearance: optional

Party Information

Debtor(s):

Farouq Omar — Represented By Arash Shirdel

Joint Debtor(s):

Marina Omar — Represented By Arash Shirdel

Movant(s):

LBS Financial Credit Union — Represented By Karel G Rocha

Trustee(s):

Karen S Naylor (TR) — Pro Se

10:30 AM
8:18-10336 James M Harris **Chapter 13**

#4.00 Motion for relief from the automatic stay REAL PROPERTY

U.S. BANK TRUST NATIONAL ASSOCIATION
Vs.
DEBTOR

Docket 49

Tentative Ruling:

Tentative for 9/21/21:

Debtor defends this relief of stay motion mostly on procedural arguments, but these are not persuasive. While another creditor (HOA) on the property might not have been correctly served, this is not much of an excuse, and the attempt to create an issue out of the assignment chain on the note secured by the subject deed of trust, even less so. The chain looks correct to the court. Presumably someone has been collecting payments for the last three and a half years; if debtor had evidence that payments had actually been made to someone else, giving rise to the dreaded 'dual creditor syndrome', the court would have expected to see it. While the purported equity cushion of 38% is of concern, the overarching issue here is that this is supposed to be a confirmed Chapter 13 plan, with all secured claims dealt with by monthly payments under the plan, and that does not embrace falling five months in arrears. If there is a legitimate question about accounting on differing balances owed, or proper application of payments made, that can be sorted out in subsequent proceedings duly noticed, but on condition that monthly payments as called for in the plan are current. The court will not indulge plan defaults or a unilateral, self-serving payment moratorium. The existence of a possible equity question may go more to the question of whether conversion is a better remedy in the interest of creditors and, even if so, whether the complaining creditor can nevertheless be given adequate protection in the interim. This is problematic on this record absent formal appraisal.

No tentative.

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CONT... James M Harris **Chapter 13**

Party Information

Debtor(s):

James M Harris — Represented By
Andy C Warshaw

Movant(s):

U.S. Bank Trust National — Represented By
Erica T Loftis Pacheco

Trustee(s):

Amrane (SA) Cohen (TR) — Pro Se

10:30 AM
8:19-12479 Judie Kay Brust **Chapter 13**

#5.00 Motion for relief from the automatic stay REAL PROPERTY
[RE: 12791 Sylvan St, Garden Grove, CA 92845]
(cont'd from 8-10-21)

CHAMPION MORTGAGE COMPANY
Vs.
DEBTOR

Docket 43
***** VACATED *** REASON: OFF CALENDAR - SETTLED BY STIPULATION RE: ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY ENTERED 9-10-21**

Tentative Ruling:

Tentative for 7/27/21:
Grant absent current status or APO.

Tentative for 6/22/21:
Grant absent post confirmation current status or agreed APO.

Party Information

Debtor(s):

Judie Kay Brust — Represented By
Christopher J Langley

Movant(s):

Champion Mortgage Company — Represented By
Sean C Ferry
Jenelle C Arnold
Joseph C Delmotte

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CONT... Judie Kay Brust **Chapter 13**

Trustee(s):

Amrane (SA) Cohen (TR) Pro Se

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Tuesday, September 21, 2021 **Hearing Room 5B**

11:00 AM

8:21-11213 Joseph Alan Jusak, Jr. **Chapter 7**

#6.00 United States Trustee's Stipulation/ Motion To Dismiss Case under 11 U.S.C. 707(b)(2) Without Refiling Bar

Docket 21

Tentative Ruling:

Tentative for 9/21/21:
Grant. Dismiss. Appearance: Optional

Party Information

Debtor(s):

Joseph Alan Jusak Jr.	Represented By Shirley A Kenninger Christopher J Langley

Trustee(s):

Weneta M.A. Kosmala (TR)	Pro Se

11:00 AM
8:21-11042 Mark W. Hill **Chapter 7**

#7.00 Motion To Avoid Judicial Lien Of Creditor Persolve LLC

Docket 26

Tentative Ruling:

Tentative for 9/21/21:

This is debtor, Mark W. Hill's ("Debtor's") Motion to Avoid Judicial Lien of Creditor Persolve, LLC ("Persolve"). Persolve opposes the motion.

1. Facts

The facts outlined in the motion are sparse, but the opposition provides some useful supplemental facts. Debtor purchased real property located at 2175 Collier Court, Tustin, CA 92782 ("Collier Property") on May 5, 2005 subject to a mortgage. On January 19, 2007, Debtor added a second mortgage on the property. On September 30, 2007, Debtor opened a credit account with Wells Fargo. On May 27, 2009, Debtor stopped paying and on May 31, 2009, the $23,959 debt to Wells was charged off. The bad debt was sold to Persolve. On May 23, 2013, Persolve filed suit. On April 27, 2015, Judgment was entered against Debtor in the amount of $38,545.87. On December 17, 2018, Persolve recorded an Abstract of Judgment on the Collier Property. On March 13, 2019, a foreclosure sale occurred on the Collier Property at the behest of the first trust deed holder. The foreclosure sale resulted in proceeds ($143,397.99) in excess of the debt owed on the mortgage. Debtor objected to the disbursement to the junior creditor and demanded the funds. As a result, Affinia, the foreclosure trustee, filed an Interpleader action per C.C.P. Section 2924(k) in Superior Court.

On April 17, 2019, Persolve filed and served its "Claim for Surplus Funds Following Trustee Sale," along with the Abstract of Judgment on the Collier Property in the Superior Court action. On April 2l 2021, Debtor settled his dispute with the second mortgage holder (AFNI) wherein AFNI would receive $126,332.99 and the remainder of $20,000 would go to Debtor. On

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CONT... Mark W. Hill **Chapter 7**

April 22, 2021 Debtor filed a petition under chapter 7. The Chapter 7 Trustee ("Trustee") filed a Report of no Distribution on June 4, 2021 indicating there are no administrable assets to distribute in debtor's case for the benefit of unsecured creditors. Debtor received his discharge on August 12, 2021.

2. Should the Lien Be Avoided?

Debtor argues that the lien impairs the exemptions the debtor has claimed under CCP Section 703.140(b)(l) *et seq*, per Debtor's Schedule C. Debtor seems to be proceeding under the "wildcard" provision found at CCP 703.140(b)(5) which allows, absent a homestead, a debtor to exempt up to $29,275 plus $1550 "in any property." But this is not made clear. Debtor argues that the lien is void as a lien that cannot exist in the absence of an underlying attachable "*res*", citing *In re Thomas*, 102 B.R. 199,201 (Bankr. E.D. Cal. 1989) ("a lien cannot exist in the absence of an underlying attachable 'res'.") Therefore, Debtor argues, Persolve's lien impairs the above claimed exemption and thus is subject to avoidance under 11 U.S.C. Section 522(f)(l), or is a lien that is void for failure to attach to a "res." But this characterization is grossly simplistic. Persolve's lien began as a judicial lien against real property which was sold, after the lien's attachment, resulting in, arguably, "proceeds" of the liened property to which the lien would automatically attach as a matter of law. See Cal. Civ. Code §2924k subd. (a) (1) – (4).

In opposition, Persolve points out that in Debtor's Schedule C Exemptions, Debtor does not seek a homestead exemption. Instead, Persolve argues, Debtor claims an exemption solely under C.C.P. Section 703.140(b), which has a maximum total exemption of value of $29,275. Persolve points out that under Section 2, Debtor listed a total of $34,217 in claimed exemptions, exceeding the maximum by $4,942. Persolve argues that Debtor listed the value of his two Music businesses (Debtor's sole income source) at $0.00, as well as the $146,332.99 foreclosure surplus at zero, even though he signed an agreement 20 days earlier establishing the value at $20,000. From this the court infers that Persolve is either arguing that the "wildcard" amount is already used up by other assets or perhaps that

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CONT... Mark W. Hill **Chapter 7**

debtor is waiving the wildcard as to the lien proceeds. Persolve also argues that this motion is procedurally improper because it was filed before Debtor received his discharge. Once the discharge was entered, Persolve argues, the case closed, and Debtor must now file a motion to reopen this case. While reopening is required, the court does not see why the question of discharge enters this dispute since operation of §522(f) operates independent of discharge.

In reply, Debtor argues that Persolve's lien was dealt with in the prior Superior Court litigation, which ended in settlement. See Exhibit B attached to Debtor's declaration in support of the Reply. But the Settlement Agreement was not signed by Persolve, so how can Persolve's lien rights have been resolved? Instead Persolve filed with the Superior Court a "Petition and Declaration Regarding Unresolved Claims…." Whether the Superior Court ever dealt with that Petition does not appear in this record. Debtor further asserts that Persolve did not actually file a proof of claim in this case, and therefore is barred from attempting to override Debtor's $20,000 obtained through the settlement. But why exactly that should be the law is never explained since Persolve's property right in the surplus funds, which started out as a lien against real property, would seem to transcend this bankruptcy proceeding absent an order of either this court or the Superior Court dealing with the claim of lien. After all, that is why §522(f) exists in the first place. Debtor also asserts that the Trustee's "no asset" report is further evidence that there is nothing in the estate to which Persolve's lien could attach, but that analysis misses the point concerning "proceeds" entirely, as explained above.

Debtor's reply seems to suggest that Persolve already obtained satisfaction in the State Court proceeding. But the settlement agreement does not make it clear what, if anything, Persolve received in the settlement. Certainly, if Persolve received a part of the settlement in exchange for bringing an end to the prior litigation, it would be wrong for Persolve to now try to get more. This would deprive Debtor of the fresh start he is likely entitled to pursuant to the August 12, 2021 discharge. In the reply, Debtor also changes the relief sought from an order avoiding Persolve's lien under §522(f)) to a "comfort order" of same. However, the factual record is not well-developed by

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CONT... Mark W. Hill **Chapter 7**

Debtor as the moving party, and each of the parties embark on legal blind alleys. In fact, the settlement of the prior litigation is only mentioned by Debtor in the Reply, again with very sparse detail, and the claimed exemption never seems focused on the proceeds. As this is Debtor's motion, he has the burden persuasion, and has not carried it. On the other hand, if the case is reopened, and the question of whether there is availability left on the 704.130(b)(5) "wildcard" is resolved, then it is *possible* a case can be stated. But not on this record.

Deny without prejudice

Party Information

Debtor(s):

Mark W. Hill	Represented By Pamela Kleinkauf

Trustee(s):

Weneta M.A. Kosmala (TR)	Pro Se

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8:13-11495 Point Center Financial, Inc. **Chapter 7**

#8.00 Motion For Order Authorizing Setoff Of Mutual Obligations, Or, In The Alternative, Authorizing And Directing The Chapter 7 Trustee To Make Distributions Pursuant To A Settlement Previously Approved By The Court
[In Person Appearance]

Docket 1895

Tentative Ruling:

Tentative for 9/21/21:

This is the motion of the Receiver for National Financial Lending, Inc. ("NFL"), Richard K. Diamond ("Receiver Diamond") for an order authorizing setoff of mutual obligations, or, in the alternative, authorizing and directing the chapter 7 trustee for Point Center Financial, Inc. ("PCF"), Howard Grobstein ("Trustee Grobstein" or "PCF Trustee") to make distributions pursuant to a settlement previously approved by this court. The motion is joined by Richard Kipperman, Brewer Corporation, Brady Company/San Diego, Inc., Dynalectric Company and Division 8, Inc. (collectively, the "Brewer Group") as well as Don Mealing and all similarly situated judgment creditors of NFL. The motion is opposed by the PCF Trustee.

1. Background

First, some commentary. Oh my, my, my…. This is so unseemly. If the parties cannot see it perhaps the court should remind everyone, several of whom are appointed fiduciaries for estates of considerable stature, that this tale of woe reads like something out of Dickens' *Bleak House*. It will serve as exhibit "1" to the many critics of how bankruptcy and other insolvency matters are handled. Lawyers will continue to squabble over every possible detail (and dime) until all the monies are exhausted, and /or, all the true creditors have long ago died or quit in disgust.

Over four years ago, this court approved an agreement relating to a sale of real property by John Menchaca, chapter 7 trustee for *The Preserve,*

LLC, to Scott Krentel (the "Preserve Agreement"). The property was owned by the Preserve. One of the liens of record against it was held by NFL, a loan pool entity set up by the principal of the PCF debtor, Mr. Harkey. Other loans appeared of record (collectively "Lenders"). The Preserve Agreement provided that Mr. Krentel would make an initial payment to acquire an "option" to buy the property, and then a second payment to purchase the property within a certain period of time. Mr. Krentel could extend the closing deadline one year by paying an extension fee of $500,000, and then could extend the closing deadline a second year by paying another extension fee of $750,000. Mr. Menchaca was entitled to retain $25,000 from each extension fee.

After deducting his share, the balance of each extension fee would be paid over by Mr. Menchaca to the PCF Trustee. The PCF Trustee is required under the Preserve Agreement to distribute approximately 47.1% of those fees to the Lenders. The PCF Trustee is entitled to retain the other 52.9%.

Mr. Krentel paid extension fees to Mr. Menchaca in March 2020 ($500,000) and March 2021 ($750,000). Mr. Menchaca paid the PCF Trustee $475,000 and $725,000 respectively, for a total of $1.2 million. Of that amount, Receiver Diamond alleges that the PCF Trustee is required under the Preserve Agreement to pay the Lenders $565,213.71, including $247,241.43 to NFL, although PCF Trustee disputes that there is any such current obligation. However, it is undisputed that, pursuant to a separate settlement agreement in another transaction approved by this court, NFL owes $311,000.77 to the PCF estate. Receiver Diamond now seeks this court's order allowing NFL to immediately offset its obligation to PCF against the obligation it believes PCF owes to NFL. In the alternative, Receiver Diamond requests that this court direct Trustee Grobstein to make a distribution based on the Preserve Agreement.

2. This Court Has Likely Been Deprived of Venue Over This Motion

Receiver Diamond and joining parties urge this court to use the power conferred by 11 U.S.C. 105(a) to enforce its order approving the Preserve

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CONT... Point Center Financial, Inc. **Chapter 7**

Agreement and specifically, Receiver Diamond's particular interpretation of that agreement. It is never a good sign when a motion begins only with a plea for recourse to the general provisions of §105. As has often been observed, this section is not so much an independent fount to create substantive authority, or "roving commission to do equity" (See New *England Dairies, Inc. v. Dairy Mart Convenience Stores (In re Dairy Mart Convenience Stores, Inc.)*, 351 F. 3d 86, 92 (2d Cir. 2003) citing *United States v. Sutton,* 786 F. 2d 1305, 1308 (5th Cir. 1986)) as it is designed to enable powers or provisions found elsewhere in the Code. But even if this court had such general authority, perhaps from general authority to supervise the conduct of the trustee in administering the estate, Trustee Grobstein points out that there is a threshold venue problem with this motion, and that Receiver Diamond did not even address the jurisdictional issue in the motion. Trustee Grobstein directs the court's attention to paragraph 14 of the Preserve Agreement Term Sheet, which states:

> "Any action to enforce the Term sheet or the Settlement Agreement, as applicable, no matter how denominated, *shall be brought in the United States Bankruptcy Court for the Central District of California, in the Preserve Bankruptcy Case (and if that case is closed a motion shall be filed to re-open that case).* The parties waive jury trial, agree that the Bankruptcy Court may enter a final order or judgment, and agree that the Final Order in The Preserve Bankruptcy Case shall contain a reservation of jurisdiction to enforce the Term Sheet or the Settlement Agreement, as applicable." See Dkt. #1479 - Exhibit 4 to the Decl. of John P. Reitman in Support of Compromise and Settlement of *Preserve LLC v. Point Center Financial, Inc., et al,* Case no. 5:12-cv-01023-GW Pending In The United States District Court, Central District of California. (Emphasis added)

The Preserve Settlement Agreement was also put into a "long form" and section 22 largely tracks the passage quoted above, but is even more specific:

> "Any action to enforce this Settlement Agreement (including any

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CONT... Point Center Financial, Inc. **Chapter 7**

of its terms and conditions), no matter how denominated, shall be brought in the Preserve Bankruptcy Case (and if that case is closed, a motion shall be filed to re-open that case). The Parties hereby agree that the Preserve Bankruptcy Court may enter a final order or judgment thereon and agree that any such final order or judgment shall contain a reservation of jurisdiction for the enforcement thereof. Each Party hereby irrevocably consents to the exclusive personal jurisdiction of and proper venue in the Preserve Bankruptcy Court for the trial, entry of findings, entry final orders and judgments solely for the purpose of resolving any and all disputes under, arising from or out of or relating to this Settlement Agreement or the Parties' right and obligations with respect thereto. If the Preserve Bankruptcy Court lacks or refuses to exercise jurisdiction over any such dispute, each Party hereby irrevocably consents to the exclusive personal jurisdiction of and proper venue before the Superior Court of the State of California, County of Los Angeles for such purpose." *Id.* at Ex. 5.

Thus, Trustee Grobstein concludes, by the terms of the Preserve Agreement, through which Receiver Diamond seeks payment, exclusive jurisdiction to interpret and enforce that settlement agreement is conferred upon either Judge Bluebond as presiding judge in the *Preserve* bankruptcy case or, should she decline to hear it, the Superior Court. In reply, Receiver Diamond surprisingly offers little argument as to why this court has jurisdiction despite the clear choice of venue provision in the Preserve Agreement and/or why that choice of venue provision is unenforceable. The closest Receiver Diamond comes to addressing the hurdle is on page 12 of the Reply where he argues that this court has the authority under the bankruptcy code to direct an offset or even direct Trustee Grobstein to make a distribution. No authority is cited for this proposition, but Receiver Diamond is likely referring to section 105(a). If that intuition is correct, then what is missing from both the Motion and Reply is authority standing for the proposition that section 105(a) empowers this court to override the clear choice of venue provision in the Preserve Agreement already approved by prior order of three different judges.

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CONT... Point Center Financial, Inc. **Chapter 7**

In a way, the motion seems inconsistent to the extent that it seeks enforcement of Receiver Diamond's (and joining parties') disputed interpretation of the Preserve Agreement, while implicitly requesting that the court ignore the clear venue provision in the same agreement. Establishing a court's jurisdiction is a fundamental prerequisite to that court's hearing any motion. As this court appears to have been deprived of jurisdiction, or more correctly, proper venue, by specific design and consent of the parties, the motion should be denied on this basis alone.

None of this is to say that the court is at all pleased by the contentious tone of these proceedings. Nor is the court happy at all with the very long time it seems to be taking to getting any relief to creditors. Since many of the creditors are known to have started this case already in advanced age, it seems likely (and sadly) that many will never see any distributions in their lifetimes, and that is a shame. But this gives the court neither the power nor the inclination to ignore the clear contractual provisions of the Preserve Agreement, since that was specifically approved by the parties and by three separate judges. But maybe admonitions to discuss settlement and efficient disposition in furtherance of that goal rather than resort to this tedious, endless and expensive litigation seen so far… will be heard?

Deny

Party Information

Debtor(s):

Point Center Financial, Inc.	Represented By Robert P Goe Jeffrey S Benice Carlos F Negrete - INACTIVE -

Trustee(s):

Howard B Grobstein (TR)	Represented By Rodger M. Landau Roye Zur Kathy Bazoian Phelps John P. Reitman

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Robert G Wilson - SUSPENDED -
Monica Rieder
Jon L. Dalberg
Michael G Spector
Peter J. Gurfein
Jack A. Reitman
Thomas A Maraz